IN THE

Supreme Court of the United States

No. 76-640

OCTOBER TERM, 1976

FRANK LUCAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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FRANK LUCAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Frank Lucas, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on September 7, 1976.

OPINION BELOW

The opinion below, ——F.2d——, slip op. p. 5471 (2d Cir. September 7, 1976), affirming the judgment below, appears in the appendix, *infra,* at pp. A1-12).*

The opinion of the District Court is set out in the appendix, *infra,* at pp. A13-14.

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*References to petitioner's appendix are designated "A".

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

QUESTION RAISED

Whether petitioner was entitled to an evidentiary hearing on his motion for a new trial based upon the Government's post-trial disclosure of prior statements made by a crucial Government trial witness, which indicated that the witness committed perjury at trial about a collateral matter and which indicated that the witness was lying to the Government during the period of time that he was cooperating.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

RULE INVOLVED

Rule 33 of the Federal Rules of Criminal Procedure.

NEW TRIAL

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7 day period.

STATUTE INVOLVED

18 U.S.C. §3500

§3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the

United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

Added Pub.L. 85-269, Sept. 2, 1957, 71 Stat. 595, and amended Pub.L. 91-452, Title I, §102, Oct. 15, 1970, 84 Stat. 926.

STATEMENT OF THE CASE

Indictment S 75 Cr. 687, filed July 10, 1975, superseding Indictment 75 Cr. 24, filed January 9, 1975, charged Frank Lucas and nineteen others with seventeen counts of conspiracy and substantive violations of the Federal narcotics laws. Lucas was specifically charged in Count I with conspiracy and in Counts 5, 6 and 7 with possession of heroin with intent to distribute.

The case went to the jury and Lucas was convicted, as charged, of conspiracy to distribute narcotics (Count 1) and three substantive offenses (Counts 5, 6 and 7) in violation of 21 U.S.C. §§812, 841(a)(1); 841(b)(1)(A), 846.

Lucas was sentenced to serve twenty years in prison on Counts 1 and 5, concurrently, but consecutive to two additional concurrent terms of twenty years imposed on Counts 6 and 7, together with a committed fine of $50,000.00 on each Count. The total sentence imposed was forty years in prison plus a $200,000.00 fine.

The Facts

At trial the Government's case consisted mainly of the testimony of two co-conspirators, Mario Perna and Anthony Verzino, both of whom had been arrested in February, 1974, and who became Government informers soon thereafter (919-30, 2103).*

At trial, Verzino and Perna testified about various aspects of the crimes charged. The main thrust of the defense was to discredit these two witnesses by establishing, among other things, that both had lied to the authorities during the very time they were supposed to be cooperating. The defense had some success in establishing this claim with respect to Verzino, but the government was able to portray Perna as a witness who had truthfully and openly assisted the government from the time of his recapture after escaping from the Federal Detention Center in New York.**

On November 11, 1975, almost three weeks after the end of the trial,***the government revealed the existence of three separate statements given to the F.B.I. by Perna within a short time after his recapture in October, 1974 (A27-49). The statements (three detailed accounts of the escape from the Federal House of Detention) indicated that Perna had testified falsely during the trial.****Even more importantly, these statements showed, contrary to the

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*References are to the trial transcript.

**See prosecutor's summation (3724-25 and 3758-59).

***October 24, 1975.

****Q. Did there come a time Mr. Perna, when you believed and Malizia believed that Verzino began to cooperate with the authorities? A. Yes Sir. Q. When was that? A. In August of 1974. * * * * Q. Subsequent to the time you learned that Verzino was cooperating with the authorities what did you and Ernest Malizia do? A. We planned an escape out of Federal Detention House (916-918), Perna's suppressed statement indicate that he began to plan his escape in the Spring of 1974, long before he learned of Verzino's cooperation.

prosecution's assertion of Perna's reformation and veracity, that Perna, after his recapture, repeatedly lied to the government about the circumstances of and the dramatis personae involved in the escape.

Lucas, among other co-defendants, moved for a new trial under Rule 33 of the Federal Rule of Criminal Procedure. The prosecutor who handled the trial filed an affidavit in opposition (A16-25). In this document, the sole explanation offered by the prosecutor for the failure to inform defendant of the existance of these statements prior to trial was that:

> "I became aware of the existence of these three statements on November 8, 1975, approximately two weeks after the verdict. These three statements were in the possession of another Assistant U.S. Attorney prior to September 22nd 1975, the date upon which trial commenced (A17)."

The district court denied, without a hearing, the motion for a new trial, specifically finding, on the basis of the prosecution's affidavit and the trial, 1) that the suppression was inadvertant, 2) that the suppressed material, if available at trial, would not have produced a different verdict and that there was no significant chance that the statements could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction, 3) that the statements were only cumulative impeachment of Perna, and 4) Perna's testimony was corroborated (A13-15).

SYNOPSIS OF ARGUMENT

The statements which were withheld were producible both as Brady material, and Jencks Act material since they, arguably, showed that Perna perjured himself at trial. On the basis of the post-trial revelation petitioner joined in a motion for a new trial. In reply to this motion, the government alleged that the reason for non-disclosure was

that the statements were in the possession of another United States Attorney until the time that this trial began and were not discovered by the assistant who tried this case until two weeks after the verdict. Upon this reply, the Court denied the motion without a hearing, finding inadvertence on the part of the government based upon the circumstances of trial and the reply affidavit.

In light of this finding of inadvertence, the Court, in deciding the motion, applied the standard of materiality appropriate to unintentional non-disclosure. This finding of inadvertence, upon which the decision rests, was improperly made, for such a finding could only be made after a hearing. The Perna material was both material and favorable to the defense and if the government's non-disclosure was intentional or grossly negligent, a new trial would have been required. Thus, the finding as to the nature of the government's culpability with regard to the non-disclosure was critical to the viability of the motion and the failure to grant a hearing on the issue was constitutional error.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW RAISES IMPORTANT AND SERIOUS DUE PROCESS QUESTIONS ABOUT THE PROPRIETY OF DENYING, WITHOUT A HEARING, A MOTION FOR A NEW TRIAL BASED UPON EVIDENCE WHICH WAS, CONCEDEDLY, WITHHELD BY THE GOVERNMENT.

The Right To A Hearing

Non-disclosure of Perna's statements was conceded.

The only contested issues were the factual circumstances surrounding the non-disclosure from which the Court would find the degree of the government's culpability and the materiality of the suppressed evidence. The Perna material was producible both as Jencks Act material (18 U.S.C. §3500), and evidence favorable to the defense under *Brady v. Maryland*, 373 U.S. 83 (1963).* The legal standards to be applied in determining whether a new trial should be granted on governmental suppression of Jencks Act or Brady material is well settled in the Second Circuit.

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*Thus it is appropriate to examine the nature of the withheld evidence. The statements contradicted the trial testimony of Perna that he first began to plot his escape from West Street after he learned, in August, 1974, that Anthony Verzino was cooperating with the government. Arguably, the subsequent statements of Perna indicated that Perna perjured himself at trial. If the non-disclosure was intentional, then a new trial would have been required "if without the perjury the jury might not have convicted." *United States v. Polisi*, 416 F.2d 573, 577 (2d Cir. 1969) (Applying the *Larrison v. United States*, 24 F.2d 82 (7th Cir. 1928) test); *United States v. DeSapio*, 435 F.2d 272, 286 n. 14 (2d Cir. 1970) *cert den.* 402 U.S. 999 (1971) (restricting the use of the *Larrison* standard to cases of prosecutorial misconduct).

If the non-disclosure was merely inadvertent or unintentional, the more restrictive *Berry v. State*, 10 Ga. 511, 527 (1851) standard is applied (whether the evidence is so material that it would probably produce a different verdict, if the new trial were granted).

If the government deliberately suppresses evidence or ignores evidence of such high value that it could not have escaped its attention a new trial is warranted if the evidence is merely material or favorable to the defense.* *United States v. Hilton*, 521 F.2d 164, 166 (2d Cir. 1975); *United States v. Kahn*, 472 F.2d 272, 287 (2d Cir. 1972); *United States v. Keogh*, 391 F.2d 138, 146-47 (2d Cir. 1968); and *United States v. Morell*, 524 F.2d 550 (2d Cir. 1975).**

If on the other hand, the failure to disclose was merely inadvertent or negligent, a new trial is required only if there is a significant chance that this added item, developed by skilled counsel, could have induced a reasonable doubt in the minds of enough jurors to avoid conviction. *United States v. Rosner*, 516 F.2d 269, 273 (2d Cir. 1975); *United States v. Morell, supra; United States v. Seijo*, 514 F.2d 1357, 1364 (2d Cir. 1975); *United States v. Sperling*, 506 F.2d 1323, 1333 (2d Cir. 1974); and *United States v. Miller*, 411 F.2d 825, 832 (2d Cir. 1969).

Thus it is obvious, that a determination of the degree of government culpability because it was essential to establish what standard is applicable in deciding the new trial motion was critical to the viability of the petitioner's motion.

Here the District Court found, on the basis of the prosecutor's affidavit, that there was no deliberate suppression and accordingly, applied the more restrictive

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*Gross negligence has been equated with deliberateness. See *United States v. Miller*, 411 F.2d 825 (2d Cir. 1969); *United States v. Consolidated Laundries*, 291 F.2d 563 (2d Cir. 1961); *United States v. Agurs*, —U.S.— (1976), 19 Cr.L. 3159, where there was no defense request prior to trial, does not change these standards.

**In cases of deliberate suppression "prophylactic considerations" designed to deter future misconduct are of overriding importance. *United States v. Morell, supra* at 554. The same considerations apply with equal force to suppression resulting from gross negligence. See *United States v. Morell, supra*, at 550, 557 (concurring and dissenting opinion of Friendly, J.)

standard in concluding that a new trial was not warranted. The Second Circuit relied upon the District Court's finding of inadvertence to affirm the order denying the motion.

It was improper to make the finding of inadvertence and deny the motion without a hearing. Even assuming the accuracy of those matters covered in the assistant's affidavit there was still no basis for a finding of inadvertence without a hearing.

The very affidavit so heavily relied upon to find inadvertence is totally inadequate to support such a conclusion. That affidavit merely states that until September 22, 1975, the Perna material was in the hands of an Assistant U.S. Attorney other than the one who tried the case. Further, that the prosecutor in this case only learned of the existence of this material on November 8, 1975, after the verdict.* There is no allegation as to where these documents were from September 22, until November 8, 1975. In fact, the affidavit leaves open the possibility that the Perna material was in the hands of the trial prosecutor after September 22, but that he did not discover this until November 8th.

In light of the fact, that gross negligence is equated with deliberate suppression, *United States v. Miller, supra,* it is inconceivable that this motion could have been decided without a hearing** where the prosecutor's affidavit avoids

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*Paragraph 4 of the affidavit in opposition states: "The above-mentioned statements, Exhibits Two, Three and Four appended to defendant Bollela's motion papers, were furnished to all defendants by letter to the Court dated November 11, 1975. (Bolella's Exhibit One). I became aware of the existence of these three statements on November 8, 1975, approximately two weeks after the verdict. These three statements were in the possession of another Assistant United States Attorney prior to September 22, 1975, the date upon which trial commenced." (A15-16).

**The United States Attorney, in his brief to the Second Circuit, concedes that: "the law is well settled in this Circuit that . . . an intentional suppression of *Brady* material will virtually mandate a new trial . . ." at p. 56.

stating whether the documents were in his possession from the inception of trial. Of course, whether this possibility is factually correct cannot now be resolved, but the impact of the possibility on the critical issue of deliberateness or gross negligence is obvious. If these statements were given to the trial prosecutor before trial, a conclusion of gross negligence in failing to recognize the duty to produce them during trial seems unavoidable.

Even if the Perna statements were in the possession of another assistant until November 8, 1975, Lucas was entitled to a hearing to determine what this other assistant did with the statements and why he did not give them to the assistant here. The necessity of such an inquiry is made especially clear by the holding in *Giglio* v. *United States*, 405 U.S. 150 (1972), that the prosecutor's office is an entity for purposes of disclosure.

Moreover, the assistant's affidavit is not conclusive. Surely, on a matter as serious as this due process mandated a hearing. Petitioner was and is not in a position to controvert the allegations contained in the affidavit since these are matters peculiarly within the prosecutor's knowledge. For precisely this reason he is entitled to inquire of the prosecutor whose affidavit leaves so much to inquire about.

United States v. Franzese, 525 F.2d 27 (2d Cir. 1975), upon which the government and the Second Circuit relied is wholly inapt. *Franzese* was a §2255 proceeding in which affidavits in support of the motion contained generalities and hearsay which merely suggested governmental misconduct. The court held that, ". . . when crediting [the] affidavits" they did not "make out a sufficient claim of prosecutorial suppression . . . to warrant relief." *Id.* at 31. In this case, prosecutorial suppression is admitted; the only issue is the degree of government culpability in that suppression. Further, the Court in *Franzese* relied upon the District Judge's knowledge, as trial judge, of the very

facts placed into dispute by the defense affidavits. Here, the disputed facts relate to the government's actions out of the presence of the District Court and as to this issue the trial court had no familiarity at all. Thus, the use of *Franzese** to deny a hearing here, is a dangerous step in the direction of trial by affidavit or by judicial impression.

The harm arising from such a cavalier treatment of a serious issue is demonstrated by the fact that only by relying upon the validity, finality and fairness of the trial court's *ex parte* determination of inadvertence did the Circuit Court find that the trial judge was correct in determining, again without a hearing, that there was no significant chance that the evidence "could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction" *United States v. Miller*, 411 F.2d 825, 832 (2d Cir. 1969).

The Materiality of the Perna Statements

In this case, the Perna material was both material and favorable to the defense.** It undercut the stability of one of the two main supports of the government's case. *United States v. Badalamente*, 507 F.2d 12 (2d Cir. 1974); *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Duardic*, 384 F.Supp. 861 (D.C.W.D.Mo. 1973) *gov't appeal dismissed*, 514 F.2d 845 (8th Cir. 1975); *United States v. Morell, supra*, (Friendly, J., dissenting); and *United States v. Seijo, supra*.

The suppressed evidence was of great significance. Perna portrayed himself as a person who had become rehabilitated after his arrest and had told the government the entire truth from that point on. No where did he admit

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*Interestingly the Second Circuit denominated the decision to deny a hearing as a close one. 525 F.2d at 32.

**All that is required for a new trial, if non-disclosure was intentional or the result of gross negligence.

that he, in fact, lied to the government after becoming a cooperative witness.

The issue of materiality and favorability of the Perna statements was resolved at trial. The government, in its affidavit in opposition to the motion for a new trial, pointed out that virtually the same type of evidence (i.e., that he lied to the government at the time he was cooperating) was properly admitted at trial with respect to Verzino, but had no effect on the jury (A19-20). Implicit in this argument, is the acknowledgment that such evidence is material and favorable to the defense, and accordingly no objection was made at the time the questions were asked. Just because these facts did not sway the jury when they related to Verzino alone does not mean that the jury would not have been swayed by a showing that both Verzino and Perna (who corroborated each other) were lying to the government at the times they were supposedly reformed and cooperating.*

This is especially so where, as here, the withheld evidence added "another arrow to [a] rather large quiver [already] shot at [the witness]." *United States v. Miller*, 411 F.2d 825, 830 (2d Cir. 1969).

CONCLUSION

FOR THESE REASONS CERTIORARI SHOULD BE GRANTED AND THE CASE REMANDED FOR A HEARING.

Respectfully submitted,
NANCY ROSNER
Attorney for Petitioner

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*The fact that the material suppressed concerned only the credibility of a witness and not the facts going directly to guilt or innocence is not dispositive. *Napue v. Illinois*, 360 U.S. 264 (1959); *Miller v. Pate*, 386 U.S. 1 (1967) and *United States ex rel. Muro v. Wilkins*, 326 F.2d 135 (2d Cir. 1964).

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 923, 982, 984, 1000—September Term, 1975

Argued: May 5, 1976 Decided: September 7, 1976

Docket Nos. 76-1011, 76-1058, 76-1062, 76-1064

UNITED STATES OF AMERICA

Appellee,

v.

JOSEPH MAGNANO, a/k/a "Joe the Grind",
FRANK PALLATTA, a/k/a "Bolot", a/k/a "Nose",
RICHARD BOLLELLA,
ANTHONY DE LUTRO, a/k/a "Tony West",
ANTHONY SOLDANO, AND FRANK LUCAS,

Defendants-Appellants.

Before:

HAYES AND MULLIGAN,

Circuit Judges,

AND PALMIERI,

*District Judge**

Appeal from judgments of the United States District Court for the Southern District of New York convicting appellants, after jury trial before Irving Ben Cooper, *Judge*, of conspiring to traffic in narcotics and possession of narcotics with intent to distribute the same, in violation of 21 U.S.C. §§846, 841(a)(1), and 841(1)(A).

Affirmed.

GRETCHEN WHITE OBERMAN, New York, N.Y., *for Defendants-Appellants Magnano and Pallatta.*

GILBERT EPSTEIN, New York, N.Y. (Stokamer & Epstein, New York, N.Y., on the brief), *for Defendant-Appellant Bollella.*

H. RICHARD UVILLER, New York, N.Y., *for Defendant-Appellant De Lutro.*

ROBERT BLOSSNER, New York, N.Y., *for Defendant-Appellant Soldano.*

JEFFREY C. HOFFMAN, New York, N.Y., (Steven Duke and John L. Pollok, of counsel), *for Defendant—Appellant Lucas.*

DOMINIC F. AMOROSA, Assistant United States Attorney (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, New York, N.Y., Nathaniel H. Akerman, Federico E. Virella, Jr., Howard S. Sussman, Lawrence B. Pedowitz, and John C. Sabetta, Assistant United States Attorneys, of counsel), *for Appellee.*

*Of the Southern District of New York, sitting by designation.

HAYS, *Circuit Judge:*

Defendants-Appellants, asserting a host of alleged errors below, appeal from judgments of conviction for conspiring to traffic in narcotics and substantive violations of the narcotics laws. Only six of appellants' many arguments warrant discussion in this opinion. We have carefully considered each of the numerous claimed infirmities in their convictions and find none to be meritorious.

The facts adduced at trial evidenced a narcotics con-

spiracy network not dissimilar, except perhaps in the quantities involved, from many such conspiracies this Court has been called upon to review. The conspiracy, in broad outline, assumed the customary structure of suppliers, distributors, and retailers. Some members of the conspiracy, depending on their functional level, dealt only with a few othere members above or below them while other members transacted business up and down the chain. The evidence at trial, as found by the jury, proved that appellants Pallatta, Magnano, Bollella, De Lutro and Soldano individually and/or collectively sold heroin to the partnership of Ernest Malizia, Mario Perna and Anthony Verzino ("the distributors" or "the core group"). Malizia is a fugitive; Perna and Verzino were unindicted co-conspirators who testified for the Government. Appellant Lucas, a retailer, was the distributor's largest customer and, controlling his own large street level distribution network, purchased in excess of 100 pounds of heroin during the conspiracy.

I. *Single Conspiracy*

As is usual in narcotics conspiracy cases the allegation is here made that although the defendants were indicted and convicted as members of a single conspiracy the proof at trial showed multiple conspiracies. *Kotteakos v. United States*, 328 U.S. 750(1946). Thus, while Magnano, Bollella and Pallatta jointly supplied the distributors, it is claimed that they formed no part of a conspiracy involving the other two suppliers, De Lutro and Soldano, each of whom also sold narcotics to the distributors. The appellants claim the existence of a least three distinct conspiracies with each conspiracy defined by the supplier. In support of this claim appellants rely on the distinguishing facts that the distributors bought from De Lutro and from Soldano only once. In contrast, the transactions with the

Magnano-Bollella-Pallatta partnership were numerous, generally credit exchanges and for diluted heroin.

We find the multiple conspiracy argument pressed by appellants with their particular emphasis on the single act doctrine singularly unpersuasive. Precedent within this Circuit abounds for the proposition that one who deals in large quantities of narcotics may be presumed to know that he is a part of a venture which extends beyond his individual participation. *United States v. Ortega-Alvarez*, 506 F.2d 455, 457 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *United States v. Mallah*, 503 F.2d 971, 983-84 (2d Cir. 1974), *cert. denies*, 420 U.S. 995 (1975)
Cir. 1974), *cert. denied*, 420 U.S. 995 (1975); *United States v. Sisca*, 503 F.2d 1337, 1345 (2d Cir.), *cert. denied*, 419 U. S. 1008 (1974); *United States v. Arroyo*, 494 F.2d 1316 (2d Cir.), *cert. denied*, 419 U.S. 827 (1974); *United States v. Bynum*, 485 F.2d 490, 495-96 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 903 (1974). The nature of the enterprise determines whether this presumption or inferenct of knowledge of broader scope and participation in a single conspiracy is justified. *United States v. Agueci*, 310 F.2d 817, 827 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963). The suppliers in the instant conspiracy, each of whom dealt directly with a member or members of the distribution core group of Perna, Malizia and Verzino, provided that group with approximately 140 pounds of heroin. By virtue of this quantity the vertical nature of the conspiracy was known to the suppliers and customers. As expressed in *United States v. Bruno*, 105 F.2d 921, 922 (2d Cir.), *rev'd on other grounds*, 308 U.S. 287 (1939):

> "[T]he smugglers knew that middlemen must sell to retailers, and the retailers knew that the middlemen must buy of importers of one sort or another. Thus the conspirators at one end of the chain knew that the

unlawful business would not, and could not, stop with their buyers; and those at the other end knew that it had not begun with their sellers."

The quantities involved, moreover, permit the inference that the suppliers must have known there was a horizontal scope to the conspiracy such that others were similarly performing in the supply role. *See United States v. Miley*, 513 F.2d 1191, 1207 (2d Cir. 1975), *cert denied*, _____ U.S. _____ (1976); *United States v. Bynum*, *supra*, 485 F.2d at 495-497. This *inference* of knowledge, furthermore, is buttressed by evidence that the Magnano-Bollella-Pallatta partnership had *actual* knowledge that the disbributors were purchasing from another source with monies owed to the partnership from credit sales to the core group.[1]

For much the same reasons the fact that De Lutro and Soldano each only consummated one transaction with the core group does not render their participation insufficient to warrant their inclusion in the single conspiracy charged. The so-called single transaction rule, *see, e.g.*, *United States v. DeNoia*, 451 F.2d 979, 981 (2d Cir. 1971) *(per curiam); United States v. Aviles*, 274 F.2d 179, 190 (2d Cir.), *cert. denied*, 362 U.S. 974 (1960); *United States v. Stromberg*, 268 F.2d 256, 267 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959), recognizes that a single isolated act does not, *per se*, support an inference that a defendant had knowledge of, or acquiesced in, a larger conspiratorial scheme. It is only "when there is no independent evidence

1. Appellants' reliance on *United states v. Bertolotti*, 529 F.2d 149 (2d Cir. 1975), is misplaced. In *Bertolotti* the indictment charging a single conspiracy was held to be an improper consolidation of at least four separate and unrelated criminal ventures involving an assortment of "unorthodox and diverse transactions," *id.* at 155, such as to preclude an inference of knowledge. The instant case, in contrast, involves only narcotics transactions and is characterized by the usual structural framework employed by participants in a narcotics distribution scheme.

tending to prove that the defendant had some knowledge of the broader conspiracy and when the single transaction is not in itself one from which such knowledge might be inferred," *United States v. Agueci, supra*, 310 F.2d at 836, that the single act is an insufficient predicate upon which to link the actor to the overall conspiracy. *See, United States v. Sperling*, 506 F.2d 1323, 1342 (2d Cir. 1974),*cert. denied*, 420 U.S. 962 (1975); *United States v. Reina, 242 F.2d 302, 306 (2d Cir.), cert. denied*, 354 U.S. 913 (1957). Each of the "single acts" here—DeLutro's sale of five kilos pure heroin and Soldano's sale of three kilos—was to core members of the conspiracy and of such a magnitude as to justify "an inference that each knew he was involved in a criminal enterprise of substantial scope." *United States v. DeNoia, supra*, 451 F.2d at 981. *See, United States v. La Vecchia*, 513 F.2d 1210, 1219 (2d Cir. 1975); *United States v. Tramunti*, 513 F.2d 1087, 1111-12 (2d Cir.), *cert. denied*, _____ U.S. _____ (1975); *United States v. Torres*, 503 F.2d 1120, 1124 (2d Cir. 1974).[2]

2. While we reject appellant's protestations of multiple conspiracies, even if we were to find the error of variance to have been committed, we would nevertheless find reversible error absent. As we have often noted, "the test for reversible error, if two conspiracies have been established instead of one, is whether the variance affects substantial rights. Fed. R. Crim. P. 52(a). The material inquiry is not the existence but the prejudicial effect of the variance." *United States v. Agueci, supra*, 310 F.2d at827. *See United States v. Sir Kue Chin*, _____ F.2d _____, _____ (2d Cir. 1976) slip op. at 3366 and cases cited therin. Each of these appellants were actively engaged in the drug world in a large-scale capacity. None were minor participants joined in trial with top echelon personnel such that proof of the guilt of major violators contaminated the jury's consideration of his guilt individually. *See United States v. Miley, supra*. 513 F.2d at 1209. Nor were the jury's deliberations infected by highly inflammatory testimony about any one of the codefendants which might spill over to the prejudice of others. *Compare United States v. Bertolotti*, 529 F.2d 149, 157-58 (2d Cir. 1975). Essentially the argument of prejudice here is merely a bald assertion that each would have fared better had he been tried alone. As we said in United States v. Borelli, 435 F.2d 500, 502 (2d Cir. 1970), *cert. denied*, 401 U.S. 946 (1971), an appellant "must demonstrate substantial prejudice from a joint trial, not just a better

II. *Prior Similar Crimes Evidence*

Government vitness Verzino was permitted to testify to narcotics dealings he had with appellants Pallatta, Magnano, DeLutro, Bollella and Lucas several years before the conspiracy charged in the indictment commenced. Appellants claim admission of this testimony was error. We disagree.

The prior similar crimes testimony was admitted to explain how Verzino, who had been incarcerated from 1966 through August, 1973, was able to become an accepted member of the conspiracy upon his release. Evidence of prior criminal acts is admissible unless offered solely to prove criminal character or disposition or the proffered evidence is of such a highly prejudicial nature as to overwhelm its probative value. *United States v. Santiago*, 528 F.2d 1130, 1134 (2d Cir.), *cert. denied*, 96 S.Ct.2169 (1976). Here, as in *United States v.Natale*, 526 F.2d 1160, 1173-74 (2d Cir.), *cert. denied*, 96 S.Ct.1724 (1976), the Government offered the prior crime evidence for the legitimate purpose of showing the background and development of the conspiracy, and the district judge, properly exercising his discretion, committed no error in allowing its admission.

III. *The Charge to the Jury*

Appellants have compiled an assortment of claimed errors in the trial court's instructions which they argue compel reversal. Reviewing the instructions as a whole, *Cupp v. Naughton*, 414 U.S. 141, 146-47 (1973), we find these claims devoid of merit. We here address only the errors claimed in the court's instructions on reasonable doubt.

the remaining objections raised on appeal are either too frivolous to warrant discussion or, because of the failure

chance of acquittal at a separate on . . . " *See United States v. Fantuzzi*, 463 F.2d 683, 687 (2d Cir. 1972).

to object below, have been waived, Fed. R. Crim. P. 30; *United States v. Ingenito*, _____ F.2d _____, _____ (2d Cir. 1976), slip op. at 2689, and are not such as to be saved by the plain error exception. Fed. R. Crim. P. 52(b).[3]

Appellants vigorously argue that the court's failure to instruct the jury, as requested, in the express language of *Holland v. United States*, 348 U.S. 121, 140 (1954) is reversible error. *Holland* defines reasonable doubt as a doubt that would cause a person to hesitate to act in matters of importance in his own life. The judge below instead instructed the jury[4] that reasonable doubt is "an

3. We briefly note appellant's claim relating to the court's accomplice testimony instruction. The claim is made that the trial court's instructions on this issue were totally inadequate because they failed to include the cautionary language of *United States v. Padgent*, 432 F.2d 710, 704 (2d Cir. 1970), which warns that "[a]n accomplice so testifying may believe that the defendant's acquittal will vitiate expected rewards that may have been either explicitly or implicitly promised him in return for his plea of guilty and his testimony." As we said in *United States v. Bermudez*, 526 F.2d 89, 99 (2d Cir. 1975), however, the *Padgent* language was suggested not for jury instructions but in the context of permitting an expansive scope for cross examination. The district court fully and adequately flagged the pitfalls of accomplice testimony for the jury's attention; the appellants have no serious ground for complaint.

4. The court's definition of reasonable doubt was in full as follows:

> Now, let's go to reasonable doubt. There is no mystery about it. An intelligent high school student can capture its full essence. What does the law mean by reasonable doubt? How much evidence does the government have to place before a jury in any criminal case? Must it be evidence beyond any possible doubt? Absolutely not. The words are reasonable doubt, and they mean that there is a doubt founded in reason, not imaginary, but founded in reason, and arising out of the nature of the evidence in the case or the lack of evidence in the case. It means a doubt which a reasonable person has after carefully weighing all the evidence. It means a doubt that is substantial and not shadowy. A reasonable doubt is a fair doubt, a doubt which appeals to your reason, your judgment, your common sense, your understanding, and arising from the state of the evidence.
>
> A defendant is not to be convicted on suspicion, conjecture, or even impressive evidence which does not rise to the dignity of significant persuasiveness.

abiding conviction of his guilt which amounts to a moral certainty—I mean such conviction or certainty as you would be willing to act upon in important and weighty matters in your own personal affairs in your own private lives."

This Court has repeatedly expressed the desirability of *Holland's* hesitate to act" language and suggested its use as preferable to alternative phraseologies. *See United States v. Acarino*, 408 F.2d 512, 517 (2d Cir.), *cert. denied*, 395U.S. 961 (1969); *United States v. Hart, 407 F.2d 1087, 1091 (2d Cir.), cert. denied*, 395 U.S. 916 (1969); *United States v. Bilotti*, 380 F.2d 649, 654 (2d Cir.), *cert. denied*, 389 U.S. 944 (1967); *United States v. Nuccio*, 373 F.2d 168, 174-75, (2d Cir.), *cert. denied*, 387 U.S. 906 (1967). In each

> Reasonable doubt is not caprice, whim, speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant or a desire to uphold the government. If after a careful and impartial consideration of all the evidence in the case from start to finish you can candidly and honestly say that you are not satisfied of the guilt of a defendant and that you do not have an abiding conviction of his guilt which amounts to a moral certainty, then you have a reasonable doubt, and in that circumstance it is your duty to acquit.
>
> One the other hand, if after such a fair and impartial consideration you can candidly and honestly say that you are satisfied of the guilt of a defendant, that you do have an abiding conviction of his guilt which amounts to a moral certainty—I mean such conviction or certainty as you would be willing to act upon in important and weighty matters in your own personal affairs in your own private lives—then you have no reasonable doubt, and in that circumstance it is your sworn obligation to convict.
>
> One final word on this subject of reasonable doubt. Reasonable doubt does not mean a positive certainty or beyond all possible doubt. This is not a mathematical problem. You are dealing with human beings, the flesh, the bone, the tissue. If the rule were you had to be satisfied beyond all possible doubt few men, however, guilty they might be, would ever be convicted, for it is practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its very nature is not susceptible of mathematical certainty. And so, in consequence, the test in a criminal case is that it is sufficient if guilt of the defendant is established beyond a reasonable doubt, not beyond all possible doubt.

of these cases, however, we found as we find in the instant appeal, that this difference of nuance does not constitute reversible error. Reading the entire charge it is clearly apparent that the substance of reasonable doubt was fairly conveyed to the jury.

Objection is made to the court's instruction that a reasonable doubt is "a doubt founded in reason," and it is "a doubt that is substantial and not shadowy." Such characterization is not erroneous, *United States v. Aiken*, 373 F.2d 294, 299 (2d Cir.), *cert. denied*, 389 U.S. 833 (1967) and in the context of the entire charge was not misleading. Similarly, appellants objections to that part of the instruction advising the jury that reasonable doubt "is not an excuse to avoid the performance of an unpleasant duty" and that if "the rule were you had to be satisfied beyond all possible doubt few men, however guilty they might be, would ever be convicted," are without merit. *See United States v. Barrera*, 486 F.2d 333, 339 (2d Cir. 1973), *cert. denied*, 416 U.S. 940 (1974). While this portion of the charge in isolation may be unduly favorable to the government, *see United States v. Shaffner*, 524 F.2d 1021, 1023 (7th Cir. 1975), *cert. denied*, _____ U.S. _____ (1976), it is not prejudicially erroneous when the charge is considered as a whole and especially when, as here, no objection was made below.

IV. *Admission of Cash into Evidence*

The government introduced into evidence slightly more than one-half million dollars in cash seized, pursuant to search warrant, from appellant Lucas' home on the day of his arrest. Appellants claim this to be prejudicial error arguing that the seizure took place nearly one year after the conspiracy terminated and that there was no connection between the cash and the crime charged. We reject this contention.

At the time the cash was seized drug paraphernalia was also found. These items, both the cash and instruments, were admissible evidence relevant to Lucas' participation in the conspiracy. Moreover, Government witnesses testified that Lucas owed the core group several hundred thousand dollars at the time of his arrest. As we said in *United States v. Tramunti, supra*, 513 F.2d at 1105, "[t]he possession of large amounts of unexplained cash in connection with evidence of narcotics trafficking on a large scale is similar to the possession of special means, such as tools or apparatus, which is admissible to show the doing of an act requiring those means." That the evidence is obtained by search conducted after the termination of a conspiracy does not preclude admissibility. *United States v. Bermudez, supra*, 526 F.2d at 95. Moreover, we do not find that the introduction of the physical evidence of the cash was so inflammatory or prejudicial to outweigh its probative value as appellants contend.

V. *Soldano Identification*

Appellant Soldano contends that the court erred in failing to hold a pre-trial evidentiary hearing to determine whether a photographic display in which Verzino identified Soldano was impermissibly suggestive. We need not explore the merits of this contention since, even assuming for purposes of decision that a hearing was warranted, no prejudice is cited by the appellant which would support reversal of his conviction.

The pre-trial photographic identification of Soldano by Verzino was not introduced by the Government at trial. Rather, Verzino made an in-court identification of Soldano after testifying to several face to face meetings he and Soldano had prior to consummating a narcotics transaction. This testimony firmly established an independent basis for the in-court identification. On cross-examination Soldano's counsel had full opportunity to explore the circumstances of the pre-trial identification at

which Soldano's picture was one of 32 pictures shown to Verzino. Even on appeal counsel does not seriously argue that the display was impermissibly suggestive or advance any real claim of prejudice suffered therefrom. In *Simmons v. United States*, 390 U.S. 377, 384 (1968), the Supreme Court held "that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Appellant's claim clearly does not meet that standard and must fail.

VI. *Brady Disclosure Subsequent to Trial*

Two weeks after trial ended the Government furnished appellants' counsel and the court with three written statements of Mario Perna, a chief Government witness at trial. Appellants immediately moved for a new trial based on newly discovered evidence pursuant to Fed. R. Crim. P. 33. This motion was denied without an evidentiary hearing. In its order the court below found the Government's failure to disclose these statements earlier was inadvertent; that the statements would not have produced a different verdict if available at trial; that the statements were at best cumulative on the issue of credibility and without bearing on the issue of defendants' guilt; and that Perna's testimony was corroborated at trial by other evidence.

We find these findings of the district court fully supported in the record. As such, the court's denial of the motion on the basis of affidavits and without an evidentiary hearing was not error. *See, United States v. Persico*, 339 F. Supp. 1077 (E.D.N.Y.), *aff'd*, 467 F.2d 485 (2d Cir. 1972), *cert. denied*, 410 U.S. 946 (1973). *Cf., United States v. Franzese*, 525 F.2d 27 (2d Cir. 1975).

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

JOSEPH MAGNANO, et al.,

Defendants.

ORDER S 75 Cr. 687 (IBC)

This matter having come before the Court on a motion for a new trial based on newly discovered evidence pursuant to Rule 33 of the Federal Rules of Criminal Procedure by defendants Magnano, Pallatta, Bolella and De Lutro and the Court having examined the three statements of Government witness Mario Perna given to representatives of the Federal Bureau of Investigation in October 1974, which are the subject matter of the motion, and the Court having found that the contents of these statements became known to the Assistant United States Attorney in charge of the prosecution approximately two weeks after the verdict when he thereupon informed the Court and all counsel of their existence, and that there was no deliberate suppression of these materials on the part of the Government, see *Giglio v. United States*, 405 U.S. 150, 153-54 (1972); *United States v. Kahn*, 472 F.2d 272, 287 (2d Cir. 1973), and that the statements would not have produced a different verdict if they had been available at trial, and that there is not a significant chance that the statements could have "induced a reasonable doubt in the minds of enough jurors to avoid a conviction, *United States v. Seijo*, 514 F.2d 1357, 1364 (2d Cir. 1975);

supra: United States v. Stofsky, Docket No. 74-1860 (2d Cir. Nov. 7, 1975) slip op. 515, 525, and that the statements, if of any value at all, were only cumulative on the issue of credibility and that they had no bearing on the issue of whether or not the defendants were guilty, *United States v. Zane*, 507 F.2d 346, 348 (2d Cir.), *cert. denied*, 421 U.S. 910 (1975), and that Government witness Mario Perna's testimony was corroborated at trial by the testimony of other witnesses documents and a tape recorded conversation, *United States v. Sperling*, 506 F.2d 1323, 1332-34 (2d Cir. 1974), and the Court recognizing that "in the interests of according finality to a jury's verdict, a motion for a new trial based upon previously-undiscovered evidence is ordinarily not favored and should be granted only with great caution, *United States v. Costello*, 255 F.2d 876, 879 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958); *United States v. Sposato*, 446 F.2d 779 (2d Cir. 1971) *United States v. Stofsky*, *supra* at 523, it is or this 6th day of January 1976, ORDERED that defendants' motion for a new trial based on newly discovered evidence pursuant to Rule 33 of the Federal Rules of Criminal Procedure be and is hereby DENIED.

Dated: New York, New York
January 6, 1976

s/
UNITED STATES DISTRICT JUDGE

APPENDIX C

AFFIDAVIT IN OPPOSITION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

JOSEPH MAGNANO,
a/k/a "Joe the Grind"
et. al.,

Defendants.

S 75 Cr. 687

STATE OF NEW YORK)
COUNTY OF NEW YORK ss.
SOUTHERN DISTRICT OF NEW YORK

DOMINIC F. AMOROSA, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Thomas J. Cahill, United States Attorney for the Southern District of New York and am familiar with the facts of this case, having been in charge of the trial prosecution.

2. I make this affidavit in opposition to the post-trial motions of the defendants for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure based on a claim of newly discovered evidence in addition to the defendants' other post-trial motions.

3. Defendants contend that three statements given to representatives of the Federal Bureau of Investigation on October 11, 1974; October 13, 1974; and October 22, 1974;

by Government witness Mario Perna entitled them to a new trial based on newly discovered evidence. This claim is frivolous.

4. The above-mentioned statements, Exhibits Two, Three and Four appended to defendant Bolella's motion papers, were furnished to all defendants by letter to the Court dated November 11, 1975. (Bolella's Exhibit One) I became aware of the existence of these three statements on November 8, 1975, approximately two weeks after the verdict. These three statements were in the possession of another Assistant United States Attorney prior to September 22, 1975, the date upon which trial commenced.

5. The three statements relate to an investigation conducted by the Federal Bureau of Investigation into the escapte of Mario Perna and others from the Federal House of Detention in New York City on September 22, 1974. Mario Perna admitted in his statement of October 22, 1974, that he was making this statement "to disclose the involvement of members of [his] family, friends, associates, and a member of the clergy, which [he] previously had desired to protect" in his previous statements, taken nine and eleven days before. None of these three statements by Mario Perna has anything whatever to do with Perna's narcotics activities or the narcotics activities of his associates about which he testified at trial. They relate entirely to his and other's plan to escape from the Federal House of Detention. To suggest that these three statements require even a hearing under Rule 33 based on newly discovered evidence, let alone a declaration of a new trial, borders on the preposterous.

6. Under the familiar standard governing motions for a new trial on the ground of newly discovered evidence, the defendant has the burden of establishing that the evidence (1) was discovered after trial; (2) could not have been discovered earlier with due diligence; (3) was material to the factual issues at trial and not merely cumulative and impeaching; and (4) of such a character that it would

probably produce a different verdict with event of a retrial. *United States v. Kahn*, 472 F. 2d 272, 287 (2d Cir.), *cert. denied*, 411, U.S. 982 (1973); *United States v. DeSapio*, 456 F. 2d 644, 647 (2d Cir.), *cert. denied*, 406 U.S. 933 (1972); *United States v. Polisi*, 416 F. 2d 573, 57677 (2d Cir. 1969); see *United States v. Houle*, 490 F. 2d 167, 170 (2d Cir. 1973).

In cases involving prosecutorial misconduct, i.e., where the record establishes that the Government intentionally suppressed the evidence or that the high value of the evidence could not have escaped the prosecutor's attention, a new trial is warranted if the evidence is merely material or favorable to the defense. *United States v. Kahn, supra*, 472 F. 2d at 287 and the case cited therein. Where the newly discovered evidence was in the possession of a responsible Government official at the time of trial but non-disclosure was inadvertent, the test is whether "there was a significant chance that this added item, developed by skilled counsel . . . , could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." *United States v. Miller*, 411 F. 2d 825, 832 (2d Cir. 1969), *United States v. Sperling*, Dkt. No. 732363 (2d Cir., October 10, 1974) slip op. 5637 at 5649; *United States v. Kahn, supra*, 472 F. 2d at 28788; *United States v. Mayersohn*, 452 F. 2d 521, 526 (2d Cir. 1971). To suggest that it is likely that Perna's statements would have been likely to change the verdict, or that they were material to the issues in this case, ignores their contents. There is nothing in these statements which even remotely concerns the issues which were presented to the jury regarding the Indictment. They simply reflect Perna's desire over a short period of eleven days to protect his family, friends and a representative of the clergy from implication in a crime which had no relationship to the instant case.

7. The authorities cited by the defendants in support of these motions are totally inapplicable to the issue before the Court and ignore the abundant body of case law in the

Second Circuit with respect to motions for newly discovered evidence. In *United States v. Slutsky*, 514 F. 2d 1222, 1225 (2d Cir. 1975), the Second Circuit repeated the rule with respect to motions directed at newly discovered evidence:

> "Motions for new trials based on newly discovered evidence are not held in great favor, *United States v. Catalno*, 491 F. 2d 268, 274 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974). To succeed on such a motion a defendant must show, *inter alia*, (1) that the evidence was discovered after trial, (2) that it could not, with the exercise of due diligence, have been discovered sooner, (3) that it is so material that it would probably produce a different verdict. *United States v. Costello*, 255 F. 2d 876, 879 (2d Cir., *cert. denied*, 357 U.S. 937 . . ."

In *Slutsky* the Court held that the defendants had not even satisfied the first two requirements and, therefore, didn't even consider whether the newly discovered evidence could have produced an acquittal. In *United States v. Zane*, 507 F. 2d 346, 347 (2d Cir. 1974) the Second Circuit again held that another requirement of the test is that the evidence be "material to the factual issues at the trial and not merely cumulative and impeaching." Nothing is more clear from the Perna statements then that they have nothing to do with the issues at trial and that they could not have altered the verdict.

No plainer proof of this is the fact that it was revealed prior to trial that the witness Anthony Verzino had lied to the Government in late 1974 and early 1975, after he had agreed to cooperate, with respect to a narcotics conspiracy apart from the one charged here. Verzino's lies to the Government with respect to the narcotics involvement of others were brought to the attention of the Jury at page 3642 of the trial record and were brought to the attention of the Jury at page 3642 of the trial record and were the subject of argument by the defendant in summation. If Verzino's post-cooperation misrepresentations to the

Government over a period of months in connection with a major heroin conspiracy to import vast amounts of drugs did not have any effect on the jury's determination, it is clear that Perna's misrepresentations over a period of eleven days regarding a subject totally alien to narcotics could have had any effect at all, except to establish cumulative evidence that Perna was not of good character. Perna, having made admissions on the witness stand ranging from conspiracy to murder men and women to perjury to large scale narcotics activities engaged in without remorse, could by no stretch of the imagination be deemed to have been of worse character by revelation of his misrepresentations to protect his wife and friends in connection with his escape.

8. Defendant Bolella's argument that the use of the statements at trial would have established that Perna was lying in February 1974 when, prior to Verzino's arrest, he told representatives of the Drug Enforcement Administration that several of the defendants were his source of supply for heroin is illogical. That Perna misrepresented facts to the Federal Bureau of Investigation with respect to the jail break in October 1974 is totally irrelevant to whether he told the truth prior to that time with respect to his narcotics activities. The subject matter of the two investigations had no connection whatsoever.

9. Moreover, the defendants could have discovered these statements during the trial with the exercise of due diligence. *United States v. Costello, supra; United States v. Zane, supra* at 347; *United States v. Slutsky, supra.* They were all aware of Perna's status as a cooperating Government witness and should have been aware that he had given information to the Government in connection with his escape from federal custody. They could have requested any statements which Perna may have given to the Government in connection with his escape. Their failure to do so is supportive of the position that they believed at the time that any statements Perna may have given the

Government in connection with his escape were irrelevant to the issues before the jury.

10. Furthermore, the defendants point to no trial testimony by Perna that he told the truth to representatives of the Government from the time of his recapture in October of 1974. As noted in defendant Bolella's motion papers, Perna testified at page 1316 of the record that he had been telling the truth to the Government from June 1975, long after the dates of the statements in question. There was nothing to prevent the defendants from asking Perna on cross-examination whether he had told the truth to all representatives of the Government from the time of his recapture in October of 1974. They elected not to do so for reasons of their own. It is of course presumed that Perna, if asked this question, would have answered truthfully and that the entire matter would have been revealed and the defendants would have discovered what they now complain about.

11. This is not a case in which there has been intentional suppression of evidence favorable to the defense, which would require a more exacting standard in evaluating defendants' claims of newly discovered evidence. *Giglio v. United States*, 405 U.S. 150, 153-54 (1972); *United States v. Kahn*, 472 F. 2d 272, 287 (2d Cir. 1973). The cases cited by the defendants, when even relevant to newly discovered evidence, direct the Court's attention to these cases, which are inapplicable here. But even under this more exacting standard, which would grant a new trial if the evidence were only material, the defendants would still not be entitled to relief as these three statements can at most be said to be cumulative of tremendous evidence of Perna's bad character, which was brought to the jury's attention. Indeed, "the term 'materiality' as used in *Brady* clearly describes evidence of greater value than that which is merely 'favorable to the accused' ". *United States v. Pfingst*, 490 F. 2d 262, 277 (2d Cir.), *cert. denied*, 94 S. Ct. 2625 (1974).

The Second Circuit has repeatedly held that, "the discovery of new evidence which merely discredits a Government's witness and does not directly contradict the Government's case ordinarily does not justify the grant of a new trial." *United States v. Aguilar,* 387 F. 2d 625, 626 (2d Cir. 1967); *United States ex rel. Rice v. Vincent,* 491 F. 2d 1326, 1329 n. 1 (2d Cir. 1974); *United States v. Sposato,* 446 F. 2d 779, 781 (2d Cir. 1971); *United States ex rel Bein v. Deegan,* 410 F. 2d 13, 20 (2d Cir. 1969); *United States v. Lombardozzi,* 343 F. 2d 127, 128 (2d Cir.), *cert. denied,* 381 U.S. 938 (1969); *United States v. Switzer,* 252 F. 2d 139, 145-46 (2d Cir. 1968); *United States v. Brewster,* 231 F. 2d 213, 216 (2d Cir. 1956); and see *Masarosh v. United States,* 352 U.S. 1 (1956); Cf. *United States v. Trapnell,* 495 F. 2d 22, 25-26 (2d Cir. 1974).

As the Supreme Court held in *Giglio v. United States,* 405 U.S. 150, 154 (1972):

> "We do not, however, automatically, require a new trial whenever 'a combing of the prosecutor's files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict. . . .' " *United States v. Keogh,* 391 F. 2d 138, 148 (CA 2, 1968).

12. Just as defendants' arguments and authorities are misplaced, their request for a hearing is equally inappropriate. No hearing is necessary in such a motion when, as here, "the moving papers themselves disclose the inadequacies of the defendants' case. . . ." *United States v. Slutsky, supra,* at 1226; *United States v. Johnson,* 327 U.S. 106 (1946); *United States v. Catalano, supra;* see 8A Moore's Federal Practice §33.03[3] (1974 Revision). Moreover, the trial court's decision on such motions is almost inevitably final. "Where newly discovered evidence is sought to place at issue the credibility of a prosecution witness we find it important to give deference to the conclusions of the trial judge whose presence at the

proceedings gives him a far better vantage than our own for this determination." *United States v. Bermudez*, Docket Number 75-1073 (2d Cir. November 6, 1975) slip op. 441, at 459. *See also United States v. Zane*, 507 F. 2d 346 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). In *Zane*, Judge Wyatt of the United States District Court for the Southern District of New York, denied a motion made on the basis of newly discovered evidence notwithstanding the fact that it was learned subsequent to trial that the chief witness for the prosecution had submitted forged letters on behalf of himself in connection with his sentencing before this Court. Judge Wyatt found, in denying defendants' motions from the bench, that the witness' credibility had been fully explored at trial, that the sending of the forged letters to this Court was merely cumulative evidence by way of impeachment and that the newly discovered proof had no relevance to the issue with which the jury was concerned. Judge Wyatt also found "that there was no probability that on a new trial with the benefit of the evidence concerning the fraudulent letters a new jury would reach a different conclusion" regarding the defendants' guilt. *United States v. Zane, supra* at 347. In affirming Judge Wyatt's decision the Second Circuit found that "[i]t is obvious that the evidence of the forgery and sending of the letters was cumulative on the issue of credibility and that it had no bearing on the issue of whether or not appellants were guilty . . ." *United States v. Zane*, at 348.

It is respectfully submitted that this Court should make the same finding as did Judge Wyatt in the *Zane* case as the "newly discovered evidence" here is even of less probativeness as that with which Judge Wyatt was concerned in *Zane*.

In any event, even assuming that Perna did not testify at all as a Government witness, the defendants would still be entitled to no relief as his testimony was completely corroborated by Anthony Verzino, who the jury obviously believed. *United States v. Sperling*, 506 F. 2d 1323, 1332-34 (2d Cir. 1974). And, contrary to defendants' claims,

there was indeed substantial documentary corroboration as well as testimonial corroboration independent of Perna's testimony, that the defendants were what the jury found them to be, *i.e.*, large scale heroin traffikers.

13. Defendant Bolella alleges he is entitled to a judgment of acquittal on Counts Two and Three, counts on which the jury was unresolved. When the jury is hung, the defendant may be retried.

14. Defendant DeLutro's other contentions have already been decided against him during the trial and should again be rejected for the identical reasons.

s/ Dominic F. Amorosa
DOMINIC F. AMOROSA
Assistant United States Attorney

Sworn to before me this
day of , 1975.

EXHIBIT TWO

November 11, 1975

Honorable Irving Ben Cooper
United States District Court Judge
Southern District of New York
Foley Square
New York, New York 10007

Re: *United States v. Joseph Magnano, et al.*, S 75 Cr. 687 (ISC)

Dear Judge Cooper:

Several days ago I learned that Mario Perna gave three written statements in October 1974 to representatives of the Federal Bureau of Investigation in connection with his escape from the Federal Detention Center in New York City in September 1974. I have enclosed copies of these materials and have also provided copies to all counsel by copy of this letter.

Sincerely,

THOMAS J. CAHILL
United States Attorney

By:
DOMINIC F. AMOROSA
Assistant United States Attorney
Tel. No. (212) 791-1960

Enclosures

INTERROGATION; ADVICE OF RIGHTS

YOUR RIGHTS

Place N.Y. N.Y.
Date Oct. 13, 1974
Time 3:05 p.m.

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed Mario Perna

Witness: s/ Edward J. Holiday, SA, FBI, NY NY 10/13/74
Witness: s/ Ricro F. Walker, SA, FBI, NY NY 10/13/74
Time 2:12 pm

STATEMENT

"I, Mario Anthony Perna, have been made aware of the identity of the FBI Agents whose names appear as witnesses on this page and of the nature of questions they desire to ask me which relates to my escape from the Federal House of Detention in New York City on September 22, 1974, and prior events connected to that escape.

s/ M.P.

"I make the following statement freely and voluntarily, and this statement is to be an addition and further clarification of a statement I made to SA Edward Holiday on the evening of October 11, 1974.

"Concerning Correction Officer Giannino, who aided me and the other six escapees, I want to say that an inmate at the Federal House of Detention by the name of John De Benidictus, also had had conversations with Giannino during the four months prior to the escape and was actually the person who informed Nelson Garcia that he thought Giannino could be approached seriously concerning an escape attempt. De Benidictus had been on friendly terms with Giannino, and Giannino had been bringing food into the jail at De Benidictus' request. De Benidictus then arranged a meeting between Giannino and Nelson Garcia, at which time a friendly and not serious conversation took place, at which time Garcia jokingly asked Giannino what it would take to get Giannino to open the doors, to which Giannino replied '$200,000'.

"A short time following that conversation, Giannino was transferred to the Control Room, and De Benidictus then arranged a subsequent meeting between Garcia and Giannino, which took place in De Benidictus' presence, and it was at this meeting that the terms regarding money to be paid to Giannino, and which appear in my earlier statement, were discussed and finalized.

"Subsequent meetings between Giannino and Garcia all were held in De Benidictus' presence, and those meetings, as my earlier statement reads, also related to obtaining impressions of the second and third doors, which we would have to go through to escape. De Benidictus obviously had full knowledge of all negotiations between Garcia and Giannino and was aware that I had completed construction of the second door key made from an impression supplied by Giannino. De Benidictus was not aware that I had successfully constructed a key which opened the first door which was made, as I earlier stated, prior to the first negotiation with Giannino regarding impressions.

"Approximately four to five days before the escape, De Benidictus was made aware of the existence of the first door key but was never told about the third door key because I did not trust him and felt that he might be setting us up. De Benidictus told Garcia that he wanted to escape with us, and he also discussed that fact with me, but I put him off because I did not trust him. A few days prior to the escape we let De Benidictus know that we had tentative plans to escape on September 23 or September 24, and I also told him that I would probably have the third key made by them. Actually, I already had it made.

"On the day of the escape, I did not tell De Benidictus of our escape plans nor did any of the other escapees because, as I said before, we did not trust him.

"The reason I did not mention De Benidictus' name before now was due to the fact that I assumed he had already given the FBI information about his knowledge of the escape and the escape plans involving Giannino."

I have read the above statement consisting of this page and two others and declare that they are true and factual to the best of my knowledge.

s/ Mario Perna

Edward J. Holiday, SA, FBI, NY NY 10/13/74
s/ Reno F. Walker, SA, FBI, NY NY 10/13/74

INTERROGATION; ADVICE OF RIGHTS

YOUR RIGHTS

Place NY NY
Date 10/22/74
Time 8:15 AM

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Singed s/ Mario Perna

Witness: s/ Edward J. Holiday, SA, FBI, NY NY 10/22/74
Witness: s/ Robert F. Kaminski, SA, FBI, NY, NY 10/22/74
Time: 8:16 AM

STATEMENT

"I Mario Anthony Perna, have been made aware of the identity of Special Agents Edward J. Holiday and Robert F. Kaminsky, whose names appear as witnesses on this page, and of the nature of questions they desire to ask me which relate to my escape from the Federal House of Detention in New York City on September 22, 1974, and prior events connected to that escape.

"I make the following statement freely and voluntarily and wish to make clear at this time that this statement is being made by me to further clarify and add to statements made by me on October 11, 1974, and October 13, 1974. Further, I am making this statement at this time to disclose the involvement of members of my family, friends, associates, and a member of the clergy, which I previously had desired to protect.

"My earlier statement concerning obtaining and using a brass plate taken from a stair at the FedSeral House of Detention was fictitious. Furthermore, I did not make the second and third door keys from impressions supplied by Correction Officer Giannino. As I indicated earlier in this statement I fabricated information concerning the brass plate and the fact that I made the second and third door keys in an effort to misdirect the investigation so as to avoid implication of the people I referred to above.

"In June or July of 1974, while an inmate at the Federal House of Detention in New York City, I did make the first key to the first of three doors necessary to negotiate for a successful escape; however, the key I made did not work and I discarded it. That first attempt was made by using a scrap piece of brass supplied to me by inmate Fiocconi, who later escaped with me. I then made another attempt at the first door key by using a file to gouge channels into a piece of metal. No guard aided me in my attempt to duplicate the first door key and I merely closely observed

that key on the keyring hanging from the guard's belt, over a long period of time. After starting construction of this key, inmates Luppes and Fiocconi asked me to attempt to line somebody up, namely a locksmith, to assist us. At about this time I was visited by my brother, Pasquale Perna, whose nickname is Patty, age 50 or 51, who resides at 5 First Street, Harrison, New York, and during my visit with my brother we discussed having a key made. My brother said he thought he knew someone who might be able to make a key. A short time later I was visited by my girlfriend, Yvonne Cruz, and during that visit, which was a contact visit, I gave her a drawing which included dimensions of the first door key, which I obtained only through visual observation of that key, and by using tongue depressors, cheese and bread dough to obtain dimensions. Yvonne gave the drawing to my brother, Pasquale, and he in turn contacted a locksmith, who I do not know but who is known to my brother and to Yvonne. I do know that the locksmith is an elderly man, retired, who resides in Harrison, New York or New Rochelle, New York.

"My brother contacted the locksmith and for a fee of $50 the locksmith made a key from the drawing I had given to Yvonne. The locksmith took approximately one day to make the key. My brother then gave the finished key to my wife, Crucita, and she put it in a large greeting card approximately eight inches by eleven inches in size, which was then placed in an envelope and joined by approximately one dozen additional similar greeting cards in envelopes, which were all then placed in a large manila envelope. My wife then brought that package containing the key to the office of a Catholic priest, known to me as "Father John," whose office is in lower Manhattan. Father John is a regular visitor to the Federal House of Detention and is between 50 and 60 years old, approximately 5'5", medium build, grayish black hair, balding. He wears glasses. My wife, upon delivering the package to Father John, asked him to deliver it to me in jail and he did so, leaving the package on my bunk. It is entirely possible that Father

John did not have any knowledge of the key.

"At the earliest opportunity I tried the key in the first door and it did not work. I then realized that the dimensions that I had given to Yvonne had been wrong. I had mistakenly thought that the dimensions of the teeth of the key were one-eighth of an inch whereas they were actually one-sixteenth of an inch.

"Through trial and error and the use of an additional scrap of brass supplied to me by Fiocconi I then made a key to the first door that worked.

"Attempts by me to duplicate the second and third door keys were unsuccessful, as I had mentioned in my earlier statements.

"After Correction Officer Giannino was successfully approached by inmate DeBenidictus and inmate Nelson Garcia, he supplied an impression in styrofoam of the second door key approximately six weeks prior to the escape. I received the impression, wrapped the impression in blank white paper and placed it in an unfranked envelope, white in color, approximately ten inches long and four inches wide. I then gave that envelope, which I had sealed and which was not addressed, to Father John with instructions for him to give it to my wife who was then in Mt. Sinai Hospital located on Fifth Avenue in Manhattan. This occurred in early August, 1974, to the best of my recollection. Father John gave the unaddressed envelope to my wife in the hospital and my brother Pasquale went to the hospital and picked it up. He then contacted the locksmith, who charged $100 to make a key from that impression. In approximately one day the key was completed and given back to Pasquale, who in turn gave it to my wife, who then followed the same procedure as I earlier described by placing the key in a large greeting card, which was placed in a larger envelope along with other greeting cards. My wife instructed my brother to bring the cards to Father John's office, which he did, but upon handing that package to Father John, Father John refused to accept it

because he felt a hard object that felt like metal. My brother offered Father John money to take the package to me and Father John refused. My brother then took the package back to my wife in the hospital at which time my brother and my wife had an argument concerning me and following that argument my brother either took the package with the key inside, or just the key itself, and gave it to Yvonne.

"As soon as I found out about Father John's refusal and informed Fiacconi and Luppes, we decided we must find another way to get the key inside. Luppes and Fiacconi suggested that the key be given to Giannino to bring in but I refused.

"The day following Father John's refusal, Father John came to the prison and confronted me on the third floor and told me he was very upset that my brother had attempted to give him a package which contained a hard object the night before. Father John told me also that my brother offered him money and then Father John told me to not ask again for him to bring in anything from anybody and also told me that if I wanted anything, he would buy it and bring it in himself. Father John told me that he did not know what was in the package brought to him by my brother and told me that he did not know what my brother was trying to do. He also said that he has prayed that he has not done anything wrong in the past, at which time he referred to the first package containing cards which also contained the key to the first door.

"Following this occurrence, Giannino supplied another impression of the key for the second door with a tracing and dimensions and at the same time supplied impressions for the key to the third door. Prior to this time, $1,500 had been delivered and placed in Giannino's car trunk as I indicated in earlier statements. The $1,500 was delivered by a man known to me as Ponzo, who is a white male, of Italian descent, approximately 5'4", approximately 35 years of age, black hair, stocky build, and who resides in

the vicinity of 116th Street and First Avenue in New York City. He works at the Delightful Restaurant, which is located at the corner of 116th Street and First Avenue in New York City. The restaurant is owned by members of Ponzo's family. Ponzo delivered that money following instructions given to him by Harry Luppes, whose true name is Ernest Malizia one of the men who escaped with me. Ponzo is Malizia's brother-in-law. Ponzo was supplied with the trunk key of Giannino's car by means unknown to me. Malizia took these impressions, wrapped them in blank white paper and placed them in an unfranked white envelope, the dimensions of which were approximately ten inches long by four inches wide. Malizia gave the envelope to Father John with instructions to hold it at his office for his son Richard Malizia, also known as Ricky, to pick up. Richard Malizia lives in Nanuet, New York with his mother, and is approximately 21 years of age, 5'7" or 5'8", slim build, black hair.

"As I mentioned, Ricky was supposed to pick up the envelope containing the impressions at Father John's office but some reason unknown to me he was unkable to do so. My brother Pasquale was unable to pick it up because of his prior contact with Father John and because Father John had refused the package with the key in it. Yvonne then was instructed by me to go to Father John's office and pick up the envelope containing the impressions, which she did.

"Yvonne then contacted my brother who told her to bring the impressions to the locksmith and gave her instructions how to get to the locksmith's location. She followed his instructions and the key to the third door was made for a price unknown to me. My brother picked the key up from the locksmith and give it to Yvonne. I want to point out that because Giannino had supplied a second impression of the second door key the locksmith made another key for the second door and, therefore, my brother picked up both keys, that is, to the second door and the third door. I also want to point that to the best of my knowledge my brother or Yvonne was holding the second

door key made by the locksmith and which was in the package refused by Father John.

"Yvonne gave the two keys plus at least two brass blanks also supplied by the locksmith to Ponzo or Ricky. Prior to giving them to either Ponzo or Ricky, Yvonne wrapped all of the keys together, which now included the key to the second door and which was wrapped in the package that Father John refused, another key to the second door, and a key to the third door, at least two brass blanks and a round and a flat file. Yvonne wrapped all of these items in white adhesive or masking tape and Ponzo put the package in the trunk of Giannino's car.

"I wish to point out at this time that Ricky was supposed to put either the money or the white package containing the keys and files in the trunk of Giannino's car but on the night he was supposed to do that Giannino's car was parked on the corner of 11th Street and West Street, which was in view of the television cameras and, therefore, no attempt was made that night by Ricky. Ponzo, therefore, accomplished both tasks on different dates.

"After viewing three keys which Agent Holiday told me were recovered at the Federal House of Detention during the week of October 14, 1974, I can say with certainty that the longest of the three keys which also has a hole in one end was made by the locksmith and was designed for the second door. That key did not work because the channels were off center and I forced the key into the lock which caused the key to split and therefore, became useless. Another of the three keys, the one with teeth on both ends, also was made by the locksmith, that is, one end was made by the locksmith and that was designed for the first door but as I mentioned earlier the teeth were one-eighth inches apart and should have been one-sixteenth inches apart. The other end of that key was an attempt by me and Fiocconi to make a key for the second door. The smallest of the three keys showed to me by Agent Holiday was an attempt made by Fiocconi at the third door key, to the best

of my recollection, and the metal used was received in the form of a blank supplied by the locksmith.

I have read the above statement consisting of this page and five others and disclose that they are true and factual to the best of my knowledge.

s/ Mario Perna

s/ Edward J. Holiday, SA, FBI, NY NY 10/22/74
s/ Robert F. Kamisky, SA, FBI, NY NY 10/22/74

INTERROGATION; ADVICE OF RIGHTS

YOUR RIGHTS

Place NY NY
Date Oct. 11, 1974
Time 8:05 p.m.

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed Mario Perna

Witness: s/ Edward J. Holiday, SA, FBI, NY NY 10/11/74
Witness: s/ Edeward L. Breen, Special Agent, FBI-10/11/74
Time: 8:09 pm

STATEMENT

I, Mario Anthony Perna, make the following statement freely and voluntarily. I am 45 years of age, my date of birth is May 6, 1929, and I was born in New York City. I escaped from the Federal House of Detention in New York City on Sept. 22, 1974.

The facts surrounding the escape are as follows: about 4½ months prior to September 22, I removed a strip of brass about 30-36 inches long and 3 inches wide from the top step of the stairs leading from the second so the third floor, also described as the inner staircase. I cannot specifically recall if the brass strip came from that staircase step but if you check at the jail you will find a brass strip missing from the top step of one of the staircases. The reason I cannot specifically recall the staircase is due to the fact that I tried to remove more than one before being successful. It was necessary to remove more than two screws to free the brass strip.

I then obtained a file from the boiler room and also cut the brass strip into pieces about 4½ inches in length by 7/8 inches and hid them in several different places. Most of the time I carried a few of the pieces on my person.

By using dampened bread dough which I pushed against the first door I was able to get an impression of the lock opening and thus the measurements oeE the lock were obtained. I then began to fashion a homemade key by filing down one of the cut brass strips and cutting the channels into the brass, that is, the side channels. The only tool I used was the file mentioned above. I then found it necessary to closely observe the actual institution cell key as it hung from the key ring while on the belt of various correction officers in order to determine how I was going to duplicate or imitate the teeth of the cell key. I filed a little at a time and two to four times a day I tried on the key in the lock of the sallyport door which is the first door I would have to open for the escape. Following a period of trial and

error lasting 4-6 weeks I had finished the key and it opened the sallyport or first door. The color of my homemade key was close to the color of the institution key and the dimensions of the finished product were about 4 to 4½ inches long, 7/8 of an inch thick. It contained 4 teeth and the teeth were 1/16 of an inch apart. I will make a drawing or sketch of the key I made.

I attempted to repeat my effort for a second or inner sallyport door and made similar impressions of the outer portion of the locks not the tumblers, using tongue depressors and a piece of cheese. I was successful in getting partial impressions of the tumblers and was therefore successful in creating a partial key containing the side grooves and some teeth but my efforts were hampered by the fact that I was not able to get a glimpse or a close look at the second or inner sallyport key due to the fact that those keys do not normally enter the institution. The second key and the house key usually remain outside the institution in the hands of correction officers working in the trash and warehouse areas.

I was therefore unable to make the second key since I could not accurately copy the teeth but I was determined to keep trying.

About 7-8 weeks prior to September 22, 1974, a correction officer by the name of Giannino, who was working on the third floor, was approached by Nelson Garcia, one of the escapees, and while making general conversation he joked with Giannino about "how much money would it take to open the doors" and Giannino replied that it would take $200,000. Giannino had been on friendly speaking terms with Garcia and had seen bringing in cold cuts to Garcia. Garcia then approached me and stated that he had the above conversation with Giannino and was wondering whether he should approach Giannino in a serious way concerning Giannino's assistance in effecting an escape. I told him that I do not know Giannino and therefore would not trust him but I also said that if he

felt confident about speaking to him to go ahead and try. At this time Garcia did not know I had made the first key. Harry Luppes, Fiocconi and no other person was aware I had made the key to the first door.

I think Garcia decided not to approach Giannino because Giannino was not in the right position to help us. However, about 6 weeks prior to September 22, Giannino was transferred to duty in the control room on the first floor and began working 4 pm-midnight which was the same shift he was working on the third floor.

Immediately after Giannino began duty in the control room Garcia approached him and asked him "what would you want to get us the keys to the sallyport" or words to that effect and also included the warehouse door. Giannino said he wanted $25,000 for the three key impressions necessary for the escape; Giannino said he wanted $5,000 for an impression of the second or inner sallyport door key and the rest upon delivery of the other two impressions. Giannino had previously mentioned financial difficulty at home. Garcia came to me and told me Giannino is willing to give us the impressions so I cut several strips off a styrofoam cup, white in color, and gave them to Garcia with instructions to give them to Giannino and instruct Giannino to press the key to the second door into the styrofoam thus leaving an impression. Giannino was given the styrofoam by Garcia and the next day or the same night Garcia gave me back two strips of styrofoam bearing the impressions of both sides of the key to the second door. The reason Giannino started with the second door was because the first door was to be his security, that is, he decided to give Garcia the first door key impression last because he would then be sure to get his money. Giannino was asked to "start us off with the second or middle door" and then the warehouse and then the first door. Giannino made no bones about it and gave it to us in order we wanted them.

The next day, or day after that, $1500 was hid in the trunk of Giannino's car, a blue Monte Carlo, not a new car

but at least a couple of years old. Giannino had given Garcia a key to the trunk of his car for the purpose outlined above. Garcia gave the key to someone he knows who handled the money payoff and as far as I know the trunk key never was returned to Giannino. I do not know where Giannino's car was parked. That night the money was placed in the car trunk and I do know it was close to the jail. I saw the trunk key and it was silver in color but had revealing yellowish spots or tarnish.

Giannino asked Garcia for the other 500 and was promised by Garcia that he would get it. Giannino said he trusted Garcia as a man and felt secure and confident that he would get his money, all his money. Within 10 days Giannino turned over to Garcia the impressions, in styrofoam, of the warehouse key the same manner as with the second door. The day following the receipt of the impressions of the warehouse key I told Garcia that he would have to go back to Giannino and get him to make a tracing of the warehouse key and make notations about the dimensions of the key. The reasons I needed the tracing and dimensions was because even though I had filed down another piece of the brass strip referred to on page 2 and had made a key which fit perfectly into the styrofoam impression the key to the warehouse did not work. The key that I made from the impressions of the second door worked and therefore it was not necessary to have a tracing of that key. So Giannino made the tracing of the warehouse key on a 4x5 piece of paper the color of which I cannot recall and made notations similar to those I made on the sketch of the first key.

After receiving the tracing of the warehouse key I filed down my homemade key a little more and tried it in the door while working in the first floor sanitation area where I was assigned work. I was finally able to get the key to work in the warehouse lock and Harry Luppes also tried it and it worked for him also.

We kept telling Giannino that the keys we were trying to

make were not working while actually the keys made by me from impressions of the ground and warehouse door were sufficient and opened the doors. By telling Giannino that they had not been successful Giannino did not pressure Garcia for more money.

After receiving the impression for the warehouse door Garcia told Giannino that they wanted to wait a while for impressions of the first door but actually, at this point, 2-3 weeks prior to September 22, 1974, all three keys were completed and worked. Giannino was never told that the keys worked in the locks.

Banina, Lopez, Fiononi, Bernstein, Luppes and Garcia all had knowledge of the keys, and that they were being made in addition to myself. Three or four days prior to September 22, we all sat down and decided to escape Sunday, September 22, 1974 because it would be a quiet day and no one would be working in the warehouse. No other inmates knew of our plans.

I want to also mention that around the time of the escape Giannino was having physical problems with his leg and had been admitted to the hospital for a day or two and then came back to work. Giannino then had to take more time off from work because of a leg problem which causes him to walk with a limp. Giannino is in his middle twenties, 5'9", 160-165 lbs., black hair, no eye glasses, clean shaven. Garcia also told on September 22 me someone in Giannino's family, possibly his mother in law, was injured in an auto accident.

On September 22, 1974, starting about 9:00 A.M. I made several attempts to open the first door with my homemade key but it couldn't open partially due to nervousness on my part. I tried unsuccessfully for about one hour. The seven of us then went up stairs to the third floor and after the population had been fed we returned to the first floor area at about 12:30 pm and after one more unsuccessful attempt at about 12:30 pm I tried again at 12:40 or 12:45 pm and the door opened. I had stationed

some of the seven escapees around the area to be sure no guards were nearby, and when I successfully opened the first door the other six men followed me. To my knowledge no other inmates witnessed the above. I don't remember who had the key to the second door but the key successfully opened that door on the first try. I thought the second door was locked behind us but I am not sure. The third door was opened by one of us, I cannot remember which one, and we were then in the warehouse.

I recall that about 12 noon, prior to the escape, I heard inmate Simmons being paged and instructed to report to the first floor and because I knew he was a computer operator in the warehouse I interpreted that to mean that someone must be working in the warehouse area. But since we had already made up our minds to go we were determined to escape regardless of the fact that someone was working in the warehouse. I figured Simmons and the other person upstairs in the business office over the warehouse might have the electronic overhead doors open but I decided to take a chance.

When we got into the warehouse we walked into the electronic door, I pushed the button and actually pushed the down button as the door was going up but it did not stop or come back down. We ran up the street where I had a car waiting for me and the other six were picked up by a truck with a 14 foot body, painted silver. I had arranged to have the car left for me with the keys left in the ash tray and a change of clothes. I immediately drove over the Queensboro Bridge and to Norther Blvd. As I drove east on Northern Blvd. I threw my prison pants, with the key to the first door in the pocket, out the window but over the top of the car near a vacant lot on the right side of the street. The location was 3-4 blocks past the elevated subway.

I want to add that the other two keys I made were left in the possession of the other six escapees. The keys were similar in color to the institution keys.

I have read the above statement consisting of this page and eleven others and declare they are true and factual to the best of my knowledge.

Mario Perna

Witnesses
Edward L. Breen Special Agent F.B.I. 10/11/74
Edmund J. Holiday, Special Agent, F.B.I. N.Y., N.Y. 10/11/74.

EXHIBIT "A"

This sketch was drawn by me 10/11/74 of the key I made for the first sallyport door.

s/Mario Perna